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In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether it is proper for the Court of Appeals to extend the landward coverage of the Longshoremen's and Harbor Workers' Compensation Act to areas not specifically included in the Act or its amendments, in the absence of an expression of congressional intent to include such areas.

(2) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a classification of workers or to an occupation not specifically included in the Act or its amendments.

(3) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a non-maritime worker doing repair work on a fixed platform not owned or operated by that worker's employer and located in state waters.

INTEREST OF KERR-McGEE CORPORATION

Kerr-McGee Corporation is the owner and operator of numerous stationary drilling and production platforms offshore Louisiana and Texas. These platforms are over the Continental Shelf or in Louisiana territorial waters. Kerr-McGee employs about 350 workers on these platforms, of which number roughly 50% are working on one or another of these platforms on any given day. In addition to its own employees, there may be something in the vicinity of 200 contract workers on these platforms daily.

Until now, Kerr-McGee has consistently compensated its employees or their dependents, in the event of disability or death occurring on a platform located in Louisiana's waters, in accordance with the compensation laws of that state. The decision of the Court of Appeals in the case at bar has confused a heretofore clear mandate and brings uncertainty into Kerr-McGee's offshore compensation program.

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CONSENT

The brief is filed with the written consent of all parties hereto, these consents being on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision in this case below broke significant new ground by extending "situs" coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to fixed offshore drilling platforms, classified by this Court as artificial islands and not included expressly or inferentially in the structures to which

Congress extended such coverage in 1972, and by extending the Act's "status" coverage to non-maritime workers, not in the platform owner's employ, who do ordinary oil and gas work on such platforms.

REASONS FOR GRANTING THE WRIT

This case offers this Court an excellent opportunity to extend its series of decisions delineating (1) the legal rules governing offshore oil and gas drilling operations and platforms, and (2) the construction of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972.

A decision by this Court in this case would definitely settle the novel and important question of LHWCA coverage of non-maritime oil and gas workers on offshore drilling or production platforms, more particularly workers not in the platform-owner's employ. At present there are many such platforms in state waters off the shores of Louisiana, Texas and California in two judicial circuits, the Fifth and the Ninth. Many non-maritime workers work on those platforms, and many of them or their dependents may become candidates for compensation in the course of such work each year.

In this case, the employer, "Herb's Welding, (is) a company which provides welding services to oil field rigs" *Herb's Welding v. Gray*, 703 F.2d 176, 177. There is nothing inherently maritime about its business.

The employee, "Gray, a welder with Herb's Welding, was assigned to ... (an) oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf" *Ibid.* He "was welding a ... gas line on

a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee." *Ibid.*

To sustain LHWCA coverage, the Fifth Circuit first analogized fixed drilling platforms to wharves, to which LHWCA coverage was extended by the 1972 amendments. In so doing it first stated, debatably, that in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), "Justice White...likened them (platforms) to wharves located above navigable waters." 703 F.2d at 177.

What Justice White's opinion for this Court in *Rodrigue* in fact did was to hold that fixed offshore drilling platforms are artificial islands, and that accidents thereon (before the 1972 LHWCA amendments) "would be no more under maritime jurisdiction than accidents on a wharf above navigable waters." 395 U.S. at 366.

The Fifth Circuit then said, equally debatably, that fixed platforms are in effect wharves for LHWCA purposes because they "are essential to and customarily used in the loading and unloading of crews, supplies and oil (and) their function is precisely that of wharves". 703 F.2d at 178.

It is something of a judicial leap to classify an entire artificial island used to drill wells to produce oil and gas as a wharf merely because crews, supplies and oil are incidentally loaded thereon and unloaded therefrom, especially since, in extending LHWCA coverage to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used *by an employer* (emphasis added) in loading, unloading, repairing or building a vessel",[1] Congress made no mention of

[1] 33 U.S.C. §903(a).

drilling platforms.

The Fifth Circuit also did not address the fact that the platform probably was not used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron). Many services on offshore platforms are rendered by non-maritime workers, like Gray, in the employ of non-maritime independent contractors.

Finally, having resolved to its satisfaction the "situs" requirement for LHWCA coverage, the Fifth Circuit resolved the "status" requirement in favor of coverage of the gas-line welder, Gray, by holding, debatably, that "his work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and removal of gas and oil", and that "offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce". 703 F.2d at 180.

The only authority cited for this proposition is the same court's decision in *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981), which, unlike this case, involved a worker on a vessel (a drilling barge), not a fixed platform or artificial island, and which held that the injured wireline operator's "work was essential to the function of the vessel". 661 F.2d at 383.

The Fifth Circuit's "status" ruling in the case at bar appears inconsistent with this Court's holding in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 354, 360 (1969), that a drill pipe tester's fall from a derrick on a drilling platform "had no more connection with the ordinary stuff of admiralty than do accidents on piers". It also

seems to conflict with the holding by the Ninth Circuit—which also has offshore platform jurisdiction, that the "status" issue depends on whether the employee's activities have a "realistically significant relationship to traditional maritime activity". *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (1975), cert. den., 429 U.S. 868.[2]

CONCLUSION

It is respectfully submitted that the legal and practical implications of these questionable holdings for the many workers so employed and for their employers in at least two of the judicial circuits warrant this Court's attention and decision.

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[2] In *Director v. Perini North River Associates*, Justice O'Connor noted that the Supreme Court has not tested "maritime employment" as used in 33 U.S.C. 902(3) by inquiring into the relationship the employment may or may not have to navigation or commerce. 103 S.Ct. 634, 648, note 27, and Justice Stevens, in dissent in that case, expressed concern about extending coverage to an undefined group of workers who plainly do not "load, unload, build or repair ships".

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this amicus curiae brief have been sent to each opposing counsel of record by depositing same in the United States Mail, postage prepaid this 9th day of November, 1983.

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Undersigned counsel further certifies that all parties required to be served have been served.

Undersigned counsel makes this certificate for purposes of complying with Rules 28.3 and 28.5 of the Rules of this Court.

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